

BROOKE HENDERSON, et al.,
Plaintiffs,
vs.
SCHOOL DISTRICT OF SPRINGFIELD R-12,
et al.,
Defendants.

APPEARANCES:

COURT REPORTER: MS. JEANNINE RANKIN, RPR, CSR
UNITED STATES DISTRICT COURT
222 N. Hammons Parkway
Springfield, MO 65806

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1 BROOKE HENDERSON, et al., v SCHOOL DISTRICT OF SPRINGFIELD
2 R-12, et al.

3 CASE NO. 21-3219-CV-S-MDH

4 CASE MANAGEMENT CONFERENCE

5 November 16, 2021

6 * * * * *

7 THE COURT: We are here for a case management
8 conference in Henderson, et al., versus the School District of
9 Springfield R-12, et al. Who will be appearing on behalf of
10 the plaintiffs?

11 MR. BOUCEK: Braden Boucek for Southwestern Legal
12 Foundation here on behalf of plaintiffs. With me today are
13 Ms. Lumley and Ms. Henderson.

14 THE COURT: All right.

15 And on behalf of the defendant?

16 MR. ELLIS: Ransom Ellis; Ellis, Ellis, Hammons and
17 Johnson in Springfield, and Ryan Olson from the same firm.

18 THE COURT: All right. Well, welcome.

19 MR. ELLIS: Thank you.

20 THE COURT: Back in -- couple years ago, maybe three
21 year ago now, the civil rules committee of the federal bar
22 changed the rules to try to encourage courts to have earlier
23 intervention into cases believing that we could better manage
24 the scope of discovery and make litigation less expensive if
25 the courts took an early interest in the cases. Since then

1 our training has told us they encourage us to do that in
2 cases. Most of us do it in some cases, not other cases. I've
3 selected this as one because it's a little bit unusual in
4 terms of what we typically see by way of cases and I thought
5 it would be beneficial to get together.

6 I always start these pretty simply. I give the
7 plaintiff, just in a minute tell me what you think your case
8 is about.

9 MR. BOUCEK: Your Honor, may I speak from the
10 podium?

11 THE COURT: You can speak from there, from the
12 podium, wherever you want to speak from. Just speak loud
13 enough we can hear you.

14 MR. BOUCEK: Absolutely. I don't usually have that
15 problem.

16 Your Honor, this is a First Amendment case brought
17 on behalf of two educators at Springfield Public School
18 System. They were -- underwent training as part of their
19 mandatory teacher evaluations and as part of that training
20 they feel like their free speech rights were violated by
21 forcing them to disclose details they did not wish to disclose
22 and affirm positions that they do not wish to affirm.

23 THE COURT: All right. And the remedy you want is
24 what?

25 MR. BOUCEK: The remedies we've asked for include

1 nominal damages of one dollar, declaratory relief and
2 injunctive relief.

3 THE COURT: All right. Is the training ongoing or
4 is it over with?

5 MR. BOUCEK: The training from 2020 is over with but
6 we expect that there may be further training and that's what
7 we hope to discover through the discovery process.

8 THE COURT: All right. So you've not -- I assume
9 there's no reason for a TRO or a preliminary injunction
10 because there's no training ongoing at this time, or there's
11 none that your clients feel is offensive?

12 MR. BOUCEK: Correct, Your Honor.

13 THE COURT: All right. If the training that you're
14 complaining about is over with, why isn't the case moot?

15 MR. BOUCEK: Well, we do ask for retroactive relief
16 in the form of nominal damages but we also believe that
17 there's prospective relief in order as well given that we
18 think the equity training is ongoing and the district has
19 expressed a commitment to keep this sort of training ongoing.

20 THE COURT: All right. I'm going to ask you some
21 more about your case, but let me hear from the defendant.

22 If you have an affirmative defense, I want you to
23 tell me about it. If your defense is there's just no evidence
24 of it, you can tell me that, too.

25 MR. ELLIS: Well, that would be the first defense.

1 But the second defense, there's a standing issue.
2 There's also -- and if you would like, I'll go ahead and tell
3 you that the district has no plans to do any further training,
4 at least this school year. You know, we think on a
5 school-year-to-school-year basis usually but that's right now
6 where it is.

7 And I say no more training. The training that I
8 think is the subject of the complaint has -- was training to
9 teachers and staff members, it was not students, and the
10 district is not going to do similar training. It's difficult
11 because there's lots of areas in this, but they're not going
12 to do similar training this year.

13 THE COURT: All right.

14 MR. ELLIS: And I mean school year.

15 THE COURT: And I kind of got you off of -- your
16 initial is that the training that did take place was
17 appropriate?

18 MR. ELLIS: Okay.

19 THE COURT: Is that your --

20 MR. ELLIS: Yes, sir.

21 THE COURT: -- initial defense?

22 MR. ELLIS: Yes, sir.

23 THE COURT: All right. Let me -- I want to look at
24 the complaint and ask some questions.

25 MR. ELLIS: More importantly, it wasn't

1 inappropriate.

2 THE COURT: Yeah, it was not inappropriate, I guess
3 is -- all right. Thank you.

4 Why don't we -- you filed an answer already,
5 correct?

6 MR. ELLIS: Yes, sir.

7 THE COURT: You didn't file motions, you just filed
8 an answer directly?

9 MR. ELLIS: No. And I will say to you, the
10 complaint in this case was quite long and I answered it within
11 30 days. I'm going to have to go back and revisit my answer
12 and I'm probably going to do an amendment, but we have that
13 timeline set out in our scheduling order so that's not a
14 problem.

15 THE COURT: Right. And we'll get to the scheduling
16 order here in a second.

17 I'm going to ask the plaintiff, I had some concerns
18 about your complaint, Paragraphs 4 and 5. Are those in front
19 of you or where you can get access to them?

20 MR. BOUCEK: If the Court doesn't object, can I call
21 it up on my computer?

22 THE COURT: You may.

23 MR. BOUCEK: Just one minute, Your Honor. Please
24 bear with me.

25 I'm looking at the complaint.

1 THE COURT: I guess my struggle with Paragraphs 4
2 and 5 is they seem to me to be political statements and not
3 allegations relevant to a complaint. Why are they in there?

4 MR. BOUCEK: Sure, Your Honor.

5 We think it's important to understand the relevant
6 backdrop here. I think the Court's point is actually well
7 taken but -- goes straight to the heart of the case, which is
8 that the teachers object to being forced to adopt a political
9 position with which they disagree and so framing we thought
10 was necessary to outline what those respective political
11 positions are.

12 THE COURT: If your clients believed that slavery
13 was appropriate and the school district's policy was against
14 slavery, would your clients be allowed to sue the school
15 district for requiring them to be anti-slavery?

16 MR. BOUCEK: No, I don't think so, Your Honor.

17 THE COURT: Why not?

18 MR. BOUCEK: I think the civil rights laws would
19 require to teach -- educational environment to affirm that
20 position.

21 THE COURT: All right. Well, at one time separate
22 versus equal was the law of the land. If a teacher during
23 that period of time had believed in equality rather than
24 separate versus equal, could they have sued their school
25 district for requiring them to teach separate but equal is the

1 law?

2 MR. BOUCEK: I'm somewhat -- I'm trying to get my
3 head around the question, Your Honor. I think that, yes, any
4 teacher could have sued to enforce the constitutional
5 guarantee of equality, if I understand the Court's question.

6 THE COURT: Well, what about evolution? Some
7 teachers do not believe in evolution, they believe in
8 creationism. Some believe in creationism and not evolution.

9 MR. BOUCEK: True.

10 THE COURT: Can a teacher sue if their school
11 district instructs them to teach evolution if they're a
12 creationist or if their school district teaches them to
13 teach -- instructs them to teach creationism if they're an
14 evolutionist?

15 MR. BOUCEK: No, Your Honor. In fact, I think that
16 there's relevant case law on that very point.

17 THE COURT: All right. So I guess I'm trying to
18 figure out how this is different.

19 MR. BOUCEK: Well, because this is a controversial
20 political topic --

21 THE COURT: So is creationism and evolution.

22 MR. BOUCEK: -- that is outside the scope of their
23 job responsibilities. There's specific --

24 THE COURT: You think a school district has no
25 obligation to teach proper race relations?

1 MR. BOUCEK: Well, Your Honor, I think that before
2 they can make anything compulsory it needs to be within the
3 scope of their job responsibilities, and the teachers here are
4 advocating a principle of equality and color blindness, not
5 against it.

6 THE COURT: I guess I'm -- I'm really struggling
7 here because there are political issues in which teachers in
8 every school district are going to disagree. They're not
9 going to agree with each other. Because they don't agree with
10 each other, one of them is not going to agree with the school
11 district policy. But under the lawsuit you filed it would
12 seem that whichever district teacher is not in touch with what
13 the school district policy is, they would have a right to sue.

14 MR. BOUCEK: Your Honor, it's very important to note
15 that -- and this goes to important government speech
16 doctrines. Whether or not this is an on-the-job job
17 requirement or not is a critical part of the inquiry. And we
18 have pled and we believe we'd be able to prove that this is an
19 unrelated matter of public concern that they have brought into
20 the governmental work space and then forced them to take a
21 particular side on a political topic.

22 THE COURT: Have you got any case that indicates
23 that -- doesn't a school district in fact have an affirmative
24 duty to see that racial justice occurs within its school
25 district?

1 MR. BOUCEK: A school has an affirmative duty to
2 comply with the civil rights laws which include Title VI
3 requiring an educational work place. But what that requires
4 is equality and --

5 THE COURT: Aren't elected school boards the ones
6 that get to decide how to implement that policy rather than
7 any individual teacher?

8 MR. BOUCEK: In the first instance, yes; however,
9 pulling an unrelated political topic and making it part of
10 mandatory teacher training, that goes straight to the
11 governmental speech doctrine and we believe that we have a
12 meritorious case and we're allowed to make it.

13 THE COURT: Has there ever been a case reported
14 that's lead down this theory --

15 MR. BOUCEK: Yes, Your Honor. We think that --

16 THE COURT: -- in a school district context?

17 MR. BOUCEK: We think that there's -- no, Your
18 Honor. There's actually a great deal of litigation in this
19 topic area right now about --

20 THE COURT: Right. A bunch of the people who don't
21 like the modern trend of race relations are now filing a bunch
22 of lawsuits.

23 MR. BOUCEK: Respectfully, Your Honor, I disagree
24 with that characterization.

25 THE COURT: Well, you told me there's a bunch of

1 lawsuits. Aren't they the ones that don't like the modern
2 trend of race relations and theory?

3 MR. BOUCEK: I can't speak to that. All I can speak
4 to you is what my clients' concerns are, which is their view
5 that equality under the law is the correct viewpoint and the
6 best way to approach this hot button racial topic, and if the
7 district is going to force them as part of their job
8 responsibilities to adopt a different responsibility, the
9 First Amendment is in play.

10 THE COURT: They're not required to work at the
11 school district, right?

12 MR. BOUCEK: Correct.

13 THE COURT: Has anybody been fired by the school
14 district as a result of this policy?

15 MR. BOUCEK: No, but the teachers --

16 THE COURT: Has anybody been demoted?

17 MR. BOUCEK: Not to my knowledge, Your Honor.

18 THE COURT: Has anybody had their pay cut?

19 MR. BOUCEK: Not to my knowledge, Your Honor.

20 THE COURT: Has any adverse employment action been
21 taken by any employee as a result of this policy?

22 MR. BOUCEK: Your Honor, if I may. Both of the
23 teachers were told that they had to do this or would face
24 those consequences. It's not necessary in the First Amendment
25 context for them to actually endure those sorts of things.

1 THE COURT: They were -- I read what you said about
2 holding up an agree sign.

3 MR. BOUCEK: Yes, sir.

4 THE COURT: Did anybody not hold up the agree sign
5 in the training, from what you've -- and I know you haven't
6 done all your discovery, but --

7 MR. BOUCEK: Yes.

8 THE COURT: Are you aware of anybody that didn't
9 hold up the agree sign?

10 MR. BOUCEK: I just don't know the answer to the
11 Court's question at this point in time. I know that one of my
12 clients was told that she needed to do that and to not hold up
13 anything other than the agree.

14 THE COURT: All right. Well, what if a teacher
15 didn't believe in gay rights and there was a student who was
16 gay. Would that teacher have a civil rights action if the
17 school district policy was that gay students are to be treated
18 equally with the non-gay students?

19 MR. BOUCEK: No, I don't think they would, Your
20 Honor.

21 THE COURT: Why not? How's that different than this
22 case?

23 MR. BOUCEK: Because that is part of the in-class
24 instructional material. This is part of teacher training
25 outside of it.

1 THE COURT: Well, okay. Let's put it in the context
2 of the basketball team. What if a coach says, I'm never
3 putting anybody who's gay on my basketball team. That's
4 outside of the instructional world. Is that legal?

5 MR. BOUCEK: That would violate the civil rights
6 laws as they are currently interpreted, Your Honor.

7 THE COURT: Because the school district would not
8 tolerate it, right?

9 MR. BOUCEK: Well, I think it just violates the
10 civil rights laws on its own and the district would therefore
11 be well within its rights to take policies to further that
12 end.

13 THE COURT: Well, what if the -- I guess where I'm
14 struggling is I don't understand how you contend this to be
15 outside the classroom. One of your clients is an instructor,
16 right?

17 MR. BOUCEK: One of them's a 504 process coordinator
18 and the other is not. Neither of them are teachers per se in
19 the classroom. This all -- everything we've alleged takes
20 place as part of teacher training. None of it is in the
21 classroom.

22 THE COURT: And so they have a right not to hear
23 what they don't want to believe?

24 MR. BOUCEK: It's not a right to not hear. It's a
25 right to not speak.

1 THE COURT: All right. And have either been
2 required to speak?

3 MR. BOUCEK: Yes.

4 THE COURT: And to whom did they have to speak?

5 MR. BOUCEK: As part of the equity training they
6 were required to speak, disclose details they did not wish to
7 disclose and affirm positions that they do not wish to affirm.

8 THE COURT: You think that violates the constitution
9 in an employment context?

10 MR. BOUCEK: Your Honor, the governmental speech
11 employment context turns very much on whether or not this is a
12 matter of public concern or a matter of private concern and
13 whether this takes place in the workplace or not.

14 THE COURT: And you think in this America race
15 relations is not a public concern?

16 MR. BOUCEK: It is a matter of public concern, yes.
17 That's why the First Amendment obtains.

18 THE COURT: All right. Let me -- I'm still confused
19 as to what you want, because there are -- I'm speculating
20 here, but I bet there are employees of the R-12 School
21 District who absolutely agree with the training they received.
22 So had the training been different and taught them that
23 equality as you describe it is what our policy is going to be,
24 would those other teachers have a right to sue because they're
25 being required to believe something they don't believe?

1 MR. BOUCEK: If it's an apples-to-apples comparison
2 and they're taking the teachers outside of the classroom
3 setting and then making them take a side on a position that
4 they do not agree, then, yes, they would have a First
5 Amendment position. But even the scenario you posited is
6 somewhat distinguishable because now you're talking about a
7 message that is in -- is consistent with Title VI of the Civil
8 Rights Act, whereas my clients' view is -- the position
9 they're making -- wishing them to adopt is in contrast to
10 equal protection in the Civil Rights Act and therefore the
11 school would have greater latitude to ensure compliance with
12 Title VI and the constitution.

13 THE COURT: Your clients are saying that the
14 training is inconsistent with Title VI?

15 MR. BOUCEK: We have not brought a Title VI lawsuit,
16 but as it bears on the hypothetical, that is one of the
17 distinctions that I would point out to the Court, yes, Your
18 Honor. Equality under the law and color blindness are the law
19 of the land.

20 THE COURT: All right. Let me give you another
21 hypothetical. When I was a kid, five hundred years ago,
22 smoking in the bathroom was the biggest issue -- disciplinary
23 issue; that and sneaking out to lunch. Those were the two big
24 issues that -- disciplinary issues. What if a teacher or a
25 employee didn't think there was anything wrong with a high

1 school student smoking and didn't want to enforce that law.
2 Could they be forced to?

3 MR. BOUCEK: Yes.

4 THE COURT: What's the difference?

5 MR. BOUCEK: You're talking about something that is
6 not a First Amendment protected activity in the first
7 instance. You're also talking about in-class discipline
8 versus --

9 THE COURT: Right to believe.

10 MR. BOUCEK: But this is --

11 THE COURT: You're infringing on their right to
12 believe if they inherently believed smoking wasn't bad.

13 MR. BOUCEK: There would be -- it would be different
14 if they were forcing them to take a position outside of the
15 educational setting that they did not wish to believe on a
16 matter of public concern.

17 THE COURT: And where did your training require them
18 to believe that outside of the educational setting, outside
19 the school system? Was there anything in this training that
20 required your clients to believe that outside the school
21 system?

22 MR. BOUCEK: We will -- we have pled and we believe
23 prove that this was not part of the classroom training, that
24 this was unnecessary, instructional, that they were folded
25 into the scope of their job responsibilities.

1 THE COURT: How's that different than smoking in the
2 bathroom? That's not part of the teacher's classroom
3 responsibility.

4 MR. BOUCEK: Well, I think the courts have
5 recognized that disciplining students in classroom hours is
6 certainly within the scope of their job responsibilities.

7 Your Honor, respectfully --

8 THE COURT: So is fighting racism.

9 MR. BOUCEK: And, Your Honor, respectfully, a great
10 deal of this is going to be dependent on the facts that we
11 think we can bring to bear about where this training occurred
12 and whether it fell within the scope of their job
13 responsibilities. That goes to a lot of the Court's
14 hypotheticals that the Court has posed.

15 THE COURT: You agree that within a classroom a
16 school district has a right to control speech?

17 MR. BOUCEK: Yes. And we have not alleged that
18 within the --

19 THE COURT: So teachers can be required to teach the
20 definition of racism and equality that you claim this training
21 was teaching inside the classroom?

22 MR. BOUCEK: That would be a very distinguishable
23 case. The First Amendment question would be very different
24 with the governmental interest weighing much more heavily in
25 that instance, Your Honor.

1 THE COURT: All right.

2 Mr. Ransom, I read the complaint. The one thing
3 that struck out to me that did concern me was allegations that
4 people were told how to vote and at least insinuation that
5 employees who didn't vote a certain way would be disciplined
6 or at least would have consequences. That's part of the
7 allegation. Tell me what your district's reaction is to that.

8 MR. ELLIS: Now we're talking about in the course of
9 the training?

10 THE COURT: Yes. Allegedly someone said that
11 everybody should vote for socialists and -- well, that was the
12 word I remember sticking out so --

13 MR. ELLIS: The district didn't require anybody to
14 vote in any particular way, if I'm understanding your
15 question.

16 THE COURT: If a trainer suggested that it was
17 district policy to require someone to vote a certain way,
18 would that trainer be acting in accordance with school
19 district policy?

20 MR. ELLIS: No, if I'm understanding what you mean
21 exactly by --

22 THE COURT: Well, I'm just picking up what the
23 allegation is so -- again, he's right, we don't know exactly
24 what the facts are yet but --

25 MR. ELLIS: Well, I think I have probably a better

1 handle on some of the facts than anybody else here, but no one
2 was disciplined. These were questions you asked earlier.

3 THE COURT: Yeah.

4 MR. ELLIS: No one was disciplined. No one was
5 terminated. Frankly, the people I've spoken with could really
6 care less what answer people gave on any of the -- there were
7 two sets of documents. There were things in Canvas which were
8 a self-directed kind of go through the -- go through the
9 process and learn, and then there was actual in-person -- and
10 it was either virtual or non-virtual -- but in-person
11 training, all in 2020. No one got disciplined for anything.
12 No one lost money, in other words. Teachers, as you know, get
13 paid a certain salary --

14 THE COURT: There's no adverse employment action, is
15 what you're saying?

16 MR. ELLIS: Right. And the training here was extra
17 training. In other words, it was not a part of their salaried
18 time. Because of --

19 THE COURT: Was it mandatory?

20 MR. ELLIS: It was mandatory.

21 THE COURT: And they received extra compensation for
22 it?

23 MR. ELLIS: They would receive extra compensation
24 for it if they came and completed it. If they didn't or chose
25 not to -- I mean, there were people that didn't complete.

1 There were very few but there were people that didn't complete
2 and they weren't disciplined.

3 THE COURT: Were the answers of the participants
4 recorded anywhere?

5 MR. ELLIS: This was done in a lot of different
6 ways. My answer to you is I don't think so.

7 THE COURT: All right. Now I'm going to try to get
8 down to the scope of the discovery now that I understand more
9 what's going on.

10 This training was instituted via policy adopted by
11 the school board?

12 MR. ELLIS: Yes.

13 THE COURT: Was there a written policy?

14 MR. ELLIS: It was actually -- short answer, kind
15 of. The district had a strategic plan. It encompassed
16 various elements. It had 1 through 4; Strategic Plan 1, 2, 3,
17 and 4 through 2019. In 2020 they instituted and went through
18 a big process with lots of partners to come up with Focus Area
19 5 which had to do with training and diversity and equity.

20 THE COURT: Did the policy adopted by the school
21 board touch upon specific materials or just concepts?

22 MR. ELLIS: Concepts.

23 THE COURT: And then they were implemented by
24 administrative personnel or by outside personnel?

25 MR. ELLIS: The district hired a person who was the

1 head of -- who was new to the district, Office of Diversity
2 and Equity.

3 THE COURT: That is now a school employee?

4 MR. ELLIS: Yes, and a defendant in this case.

5 THE COURT: All right.

6 All right. Let me ask him another question. I'm
7 trying to fashion what my ruling would be in this case and
8 right now we have an elected school board who's subject to
9 reelection and defeat and all those things. If I rule what
10 the school district has to do, I'm not subject to election; I
11 have a lifetime appointment. So I guess I'm struggling as to
12 how society is better or the law is advanced by having federal
13 judges tell local school boards how they have to implement
14 racial sensitivity training. Shouldn't that be decided by the
15 school board and if your clients are unhappy with them they
16 can campaign against them?

17 MR. BOUCEK: May I approach, Your Honor?

18 THE COURT: Yeah. However you want to respond.

19 MR. BOUCEK: Thank you, Your Honor.

20 I think that brings to light a very important
21 distinction. We are not asking the Court to set policy. We
22 are not asking the Court to override the district's views on
23 how particular political topics should be taught. We are
24 bringing a straight up First Amendment claim and that is some
25 distinction. All we are asking the Court to do is go down

1 well trod First Amendment doctrine to say what they can and
2 can't tell, instruct a government employee to say in a
3 particular setting. So this is a First Amendment question.
4 We are not --

5 THE COURT: So you want me to tell them what they
6 can and cannot say?

7 MR. BOUCEK: No, Your Honor.

8 THE COURT: You don't want that?

9 MR. BOUCEK: We want you to tell the school board
10 what they can and can't tell them to say. It's a compelled
11 speech issue at its heart.

12 THE COURT: Even at the school? I understand that
13 in their private lives they can believe whatever they want to
14 believe.

15 MR. BOUCEK: Sure.

16 THE COURT: But you're telling me that I can tell
17 the school districts they can't even tell them how they can
18 implement -- take advantage of their job or implement their
19 job?

20 MR. BOUCEK: Your Honor, I think the Court is again
21 getting at a very important legal question that we're going to
22 be heavily briefing to the Court about where this took place
23 and what the First Amendment rights are in that space. But to
24 accept what the Court's saying -- and I do accept it --
25 teachers have very little First Amendment rights when they're

1 actually performing instruction in front of students. That's
2 why we have not alleged that and my clients have not alleged
3 it. But teachers have a very different First Amendment
4 interest when you're taking them to part of training that is
5 unrelated to their core job responsibilities and then making
6 them weigh in on political questions that are unrelated to
7 what actually their job responsibilities are. We think with
8 briefing and discovery the Court will be in a better position
9 to judge that.

10 THE COURT: All right. I got one more --

11 MR. BOUCEK: Absolutely, Your Honor.

12 THE COURT: -- one more hypothetical that bounced
13 through my mind as I read through this.

14 In the last ten years one of the hot topics in both
15 society and the schools would be what I guess they call the Me
16 Too movement or sexual harassment. I think the school
17 district has adopted kind of a no tolerance policy where -- I
18 mean, it doesn't take much to get reported and get in trouble.
19 If a teacher thinks that that policy is too restrictive, do
20 you think -- and they attend the seminar and it says this is
21 sexual harassment and the teacher doesn't think that's sexual
22 harassment, can they then sue the school districts for making
23 them interpret sexual harassment in a way different than what
24 they personally believe it is?

25 MR. BOUCEK: Again, it's somewhat fact sensitive.

1 There are a couple of distinctions I'll point out there. One
2 is, are you actually asking them to implement this or to also
3 say they agree with it. Again, this is a First Amendment
4 question and there is a distinction between speech and
5 conduct.

6 THE COURT: So your clients can be required to
7 implement the racial policy consistent with the training they
8 received?

9 MR. BOUCEK: As long as it's consistent with the
10 Equal Protection Clause and Civil Rights Act. And we have not
11 put that question before the Court. We have not alleged it.
12 But, yes.

13 THE COURT: So what is it that you think made your
14 clients agree other than what some employee said you need to
15 agree? There's no district policy saying everybody has to say
16 I agree to these questions.

17 MR. BOUCEK: Well, they were -- we believe the facts
18 will show, as we have pled, that they were told that there was
19 only one right answer to the questions, they needed to divulge
20 personal details about --

21 THE COURT: Told by who?

22 MR. BOUCEK: Told by their trainers in these
23 training sessions as part of the district-wide training. And
24 it's gotten less attention both today and, you know, in the
25 interaction between the parties, but there's a second part of

1 this training called Canvas modules which was actually --

2 THE COURT: Well, couldn't there just be one correct
3 answer if you're going to correctly implement the policy of
4 the district?

5 MR. BOUCEK: Well, again, that's --

6 THE COURT: For example, sexual harassment. Some
7 student taps a -- someone else on the butt and that person
8 says, Oh, that's just a happy tap, that's not sexual
9 harassment. If the school policy says that's sexual
10 harassment, then the only correct answer when asked that is
11 that sexual harassment in training is yes, that's sexual
12 harassment.

13 MR. BOUCEK: Sure. And that's certainly a different
14 scenario because now you're saying what is the district's
15 policy.

16 THE COURT: Well, and here you're talking about what
17 is racism.

18 MR. BOUCEK: We're not asking them to say what is
19 the district's policy on racism. We're asking them to affirm
20 that they personally agree with this, not merely that this --
21 I mean, they had to stand up and actually say things about
22 what their identity consists of and who they are that were
23 deeply objectionable to their core beliefs and that in that
24 sense is different.

25 And the other thing I'll point out about the Me Too

1 thing -- which I think is a perfectly valid governmental
2 interest -- is you're also talking about things that are
3 directly related to the workplace employment setting as well
4 and certainly it's within a district's responsibility to
5 require employees to understand how to interact with their
6 co-workers.

7 THE COURT: Well, and that's something I noticed all
8 through. You refer to your people as individuals but they're
9 actually -- the actions here are as employees.

10 MR. BOUCEK: That's true.

11 THE COURT: But you're arguing that it was outside
12 the scope of their duties. Is the scope of their duties not
13 something that the school district determines?

14 MR. BOUCEK: That's a legal question that ultimately
15 we will be putting before the Court. Again, if this is within
16 the scope of their job responsibilities, the First Amendment
17 interest that they have is far diminished.

18 THE COURT: Everybody needs to understand that at
19 these things I probe questions to try to understand the scope
20 of the complaint and the scope of the arguments and to predict
21 what legal issues are going to come down the pike as the case
22 progresses. That's why I ask these questions.

23 MR. BOUCEK: Your Honor, in this case I think it's
24 been quite useful to illuminate where I think some of the
25 determining legal questions actually lie.

1 THE COURT: You think -- you're not talking about
2 within a classroom in terms of curriculum?

3 MR. BOUCEK: Correct.

4 THE COURT: I guess in a school district what
5 context would these issues of race arise other than within a
6 classroom and watching students interact with each other? I
7 guess that's -- I don't understand --

8 MR. BOUCEK: Sure. I think that's a -- salient to
9 the questions that I'm kind of alluding here today. We think
10 they aren't related to that. They're related to instructing
11 these teachers to have personal views that they hold outside
12 the workplace.

13 THE COURT: Well, if a teacher observes one student
14 treat a student of a different race in a certain way, can't
15 the district determine whether or not that's an acceptable
16 conduct under the school district's policy?

17 MR. BOUCEK: I think within the scope of the
18 constitution Civil Rights Act, yes, and they would have broad
19 authority to do so.

20 THE COURT: Okay. And I'm still puzzled. You keep
21 saying -- how did we try to control -- how did the school
22 district try to control these employees' beliefs outside of
23 the school?

24 MR. BOUCEK: Because much of the training is not
25 relevant, nor did it even purport to be relevant to their

1 interactions with students in the school. It was just about
2 these larger political questions that are raging through the
3 country right now.

4 THE COURT: Well, but don't you think the training
5 was only concerned about how those broader issues would be
6 implemented within the school district?

7 MR. BOUCEK: I think that we need some fact
8 discovery on that very question, Your Honor. Based on what
9 I've seen and the documents I've seen, I think it was far, far
10 outside that scope.

11 THE COURT: All right.

12 Mr. Ransom, you want to respond to that issue?

13 MR. ELLIS: Yes, sir.

14 I think one thing that might be missing here is that
15 the training was not limited to dealing between adults and
16 children. It also involved dealing between adults. It wasn't
17 limited by age. But the training in 2020 was -- as you've
18 said, had to do with sensitivity and -- whether it was right
19 or wrong and the way it was delivered, it had to do with
20 sensitivity and racial issues primarily, but when you get
21 right down to it, equity and diversity also moves on to sexual
22 and gender issues as well, they just haven't done the training
23 on it.

24 Does that make sense?

25 THE COURT: This training was for all employees or

1 just employees in certain categories?

2 MR. ELLIS: All employees. Bus drivers, I think
3 they did cooks, although they don't have a whole lot --

4 THE COURT: Did the training purport to implement
5 any specific written policy of the board? In other words, the
6 board -- I know they want -- it's generally racial, but is
7 there a written policy that said this is to train our
8 employees on this policy?

9 MR. ELLIS: Well, you had the strategic plan which
10 is the framework for what was happening.

11 THE COURT: You said it was Section 5 was the one
12 that impacted this?

13 MR. ELLIS: Yeah. Focus Area 5, I think, is --

14 THE COURT: Focus Area 5.

15 MR. ELLIS: Yeah. Certainly the district has a
16 non-discrimination language, general non-discrimination
17 language. Every district has that because it's required and
18 the right thing to do.

19 THE COURT: And this policy was from the school
20 district's perspective the way that it was implementing the
21 law on non-discrimination?

22 MR. ELLIS: I won't say that. I don't know. I
23 think that was the intent. The intent was to have people
24 treat each other appropriately in classrooms and in schools
25 and have a welcoming place for kids to come that's safe.

1 THE COURT: All right.

2 Plaintiffs' counsel, you said there were other
3 lawsuits. Have any advanced to a decision level or an
4 appellate level at this point?

5 MR. BOUCEK: None quite like this, Your Honor. And
6 bearing in mind that these are new issues. You've seen
7 similar sort of lawsuits with things like pronouns for
8 transgender students. But the question at its bottom, Your
9 Honor, is really just one of governmental speech in the
10 workplace and where the workplace starts and that's been a
11 question that's been around for many, many decades.

12 THE COURT: I've dealt with that in terms of
13 sheriff's offices and deputies criticizing the sheriff usually
14 having to do with an election going on. I've had several
15 cases over the years I've been involved with involving that
16 issue. I don't think that law applies much here because that
17 has to do with statements that -- where people were actually
18 terminated because they claimed the statements made critical
19 of the sheriff actually caused disharmony within the office
20 and I don't think that body of law is quite -- it's kind of
21 different than what you've had here.

22 MR. BOUCEK: There is some overlap, Your Honor, and
23 I'm familiar with those cases, all having to do with what's in
24 the workplace and what's not.

25 THE COURT: What can be said in the workplace,

1 right.

2 You -- I think you said this earlier. You agree
3 that within the school district in interpreting policy your
4 clients had a responsibility to follow the training but they
5 didn't have an obligation to necessarily agree with it?

6 MR. BOUCEK: I think that if I'm understanding the
7 Court's question correctly, yes. Conduct is very different
8 from speech.

9 THE COURT: All right. Other than having -- feeling
10 like they had to say I agree during the training, any other
11 consequence to your clients?

12 MR. BOUCEK: Well, we have a chilling effect on
13 their speech as part of our First Amendment claim, if that's
14 within the Court's --

15 THE COURT: Chilling during the training or during
16 the school?

17 MR. BOUCEK: During the training, Your Honor, yes.

18 And then the third claim --

19 THE COURT: I guess when I read your -- I'm sorry.
20 When I read your -- I got the idea that they had like groups
21 where you were asked your opinion and your clients didn't give
22 their true opinions?

23 MR. BOUCEK: Right, they were -- I think the Court's
24 correct. They were brought into these training sessions and
25 they would go into small groups within them but there was only

1 one correct position to hold in those things and if you had a
2 different perspective, then you were going to face
3 consequences within that group setting.

4 THE COURT: By that you mean the other people in the
5 group would criticize you, or do you mean the school district
6 would take some type of action against you?

7 MR. BOUCEK: Well, there was only one correct answer
8 per the equity training and so it fostered an environment
9 where they were not free to --

10 THE COURT: I guess what -- and I'm getting back to
11 this, but as to what the district policy is, there might only
12 be one correct answer?

13 MR. BOUCEK: Sure. And, again, I'll draw a
14 distinction between asking them to say what is the district's
15 policy and what is the truth on this political question. And
16 I think that --

17 THE COURT: Well, for purposes of the employee of
18 the school district, the truth is whatever the district policy
19 says, isn't it?

20 MR. BOUCEK: Well, but there's a difference between
21 a question that is what is the district's policy regarding
22 question X and then what is the truth about race relations in
23 the United States.

24 THE COURT: All right. And your clients' position
25 is that there is no systematic racism in our institutions?

1 MR. BOUCEK: That's not my clients' position, Your
2 Honor. Respectfully, I think that's kind of outside the scope
3 of what we've pled in our complaint.

4 THE COURT: Well, you're saying that they were
5 forced to take positions they didn't believe in. I guess I
6 felt like if I know what they believe in I can better know
7 whether or not they were forced to believe something they
8 didn't believe in.

9 MR. BOUCEK: Well, to try to address the Court's
10 question, terms like systemic racism are slippery terms.
11 Different people use different things when they use those
12 terms and depending on what that term means, I better be able
13 to say what my clients' views on that might be.

14 THE COURT: All right. That's fair.

15 That would also cut the other way; the other person
16 might mean something by systemic racism that is not offensive
17 to your client but there are some people who the way they use
18 the phrase would be offensive.

19 MR. BOUCEK: I think that's entirely fair, Your
20 Honor.

21 THE COURT: Toward that end, look at Paragraph 6 of
22 your complaint. You got that up again? I'm sorry to --

23 MR. BOUCEK: I'm looking at it, Your Honor, yes.

24 THE COURT: I guess, As a condition of employment,
25 all staff attend and participate in equity training to learn

1 about oppression, white supremacy, systemic racism, engage in
2 identity development and understanding, and become anti-racist
3 educators.

4 Is there anything in any of those goals that were
5 offensive or the way they were implemented?

6 MR. BOUCEK: Yes. As the term anti-racist is
7 used -- and, again, that's another slippery term that means
8 different things to different people, but as the term
9 anti-racist was defined by the district, I think my clients
10 would tell you that they find that term offensive because what
11 they consider to be anti-racist is a rejection of colorblind
12 principles which requires them to reject the very Equal
13 Protection Clause itself.

14 THE COURT: That's a political statement that --

15 MR. BOUCEK: Agreed.

16 THE COURT: -- a whole lot of people don't agree
17 with.

18 MR. BOUCEK: Agreed.

19 THE COURT: So if the school district adopted that
20 policy, there would be school teachers suing the school
21 district saying that you made me believe that interpretation
22 of racism.

23 MR. BOUCEK: Which is why controversial political
24 topics are best avoided whenever necessary as a condition of
25 employment.

1 THE COURT: Well, first of all, it's not a condition
2 of employment. Nobody was fired, right?

3 MR. BOUCEK: It doesn't have to be -- you don't have
4 to get fired to make it a condition of employment.

5 THE COURT: Well, according -- over here there were
6 people who didn't have the training and they were still
7 employed, so what makes you think it's a condition of
8 employment?

9 MR. BOUCEK: Well, that's going to be a fact
10 question, but they were certainly told that it was a condition
11 of their employment and it was mandatory.

12 THE COURT: Well, I have to be honest, I'm
13 struggling to see the theory here. And not so much that I
14 care what the definition of racism is, I think -- my thought
15 is that's up to the local school district, but more in that
16 it's a controversial issue and yet the school district I don't
17 think has the opportunity to just ignore issues of racism. I
18 think it has to have some policy on it. And whatever policy
19 they pick, somebody's not going to like because it's such a
20 controversial topic. I guess that's my frustration with where
21 you're coming from. I'm certainly willing to hear your
22 briefing and your -- obviously discovery, as you say.

23 All right. Let's talk about the specific scheduling
24 here. Amended pleadings by December 3rd. I think Mr. Ellis
25 has said that he plans to amend his answer.

1 Is December 3rd still an acceptable date for that?

2 MR. ELLIS: Yes, sir.

3 THE COURT: All right. And does 12/3 still work for
4 you on amending your pleadings?

5 MR. BOUCEK: Yes, Your Honor.

6 THE COURT: All right. Discovery, you all think you
7 can be done by May, still good, May 31st?

8 MR. ELLIS: Yes, Your Honor.

9 MR. BOUCEK: I don't think there's any revision to
10 any of these dates.

11 MR. ELLIS: We had quite a discussion on that. I
12 think we both feel we can get it done.

13 THE COURT: Let me talk a little bit. I'm a big
14 believer in Rule 26 is share each other what you got. I
15 assume that whatever training materials you know about you're
16 going to provide?

17 MR. ELLIS: Yes, sir. They're also online, sir.

18 THE COURT: And whatever training materials your
19 client was subjected to you're going to provide so that we're
20 all talking about apples and apples here?

21 MR. BOUCEK: We certainly want to. I mean, our
22 ability to get those documents is somewhat limited, but yes.

23 THE COURT: If you have them. Obviously you can't
24 produce something you don't have.

25 MR. ELLIS: My initial disclosures had the training

1 materials from 2020.

2 THE COURT: And this Strategic Plan No. 5, that --

3 MR. ELLIS: It's online on the district website.

4 THE COURT: All right. So now you know about that.

5 I don't know if you need to see it but now you know about it.

6 MR. BOUCEK: And, Your Honor, the parties have been
7 very cooperative throughout this litigation. Mr. Ellis has
8 been very accommodating.

9 THE COURT: Let's talk about depositions.

10 Whenever we have a public entity like this, we
11 always get into the issue of which school board members if any
12 are going to be deposed and obviously you're going to want the
13 diversity trainer, I suppose. You're going to want to depose
14 the plaintiffs. I assume you might want to depose people who
15 -- did the two participate in the same pod of training or were
16 they in separate --

17 MR. ELLIS: No.

18 MR. BOUCEK: They were separate, Your Honor.

19 THE COURT: So you may have to get some other people
20 who participated in that same training to see if they
21 perceived things the same way as they did.

22 How many were in the training at a time? Are we
23 talking dozens or five or six?

24 MR. ELLIS: Dozens and dozens. They had the
25 cafeteria at the high school full sometimes and --

1 MR. BOUCEK: If it's some reassurance to the Court,
2 based on my limited interaction with Mr. Ellis, I think it --
3 there may be less factual disagreements than the Court might
4 think. Our limited discussions indicate that this is probably
5 going to be more of a matter of law than most of the facts
6 we'll be able to kick to the Court.

7 THE COURT: All right. Experts. You expect to have
8 experts?

9 MR. BOUCEK: No, Your Honor.

10 MR. ELLIS: No.

11 THE COURT: I couldn't think of any that you'd have
12 but didn't want to prejudge something.

13 MR. ELLIS: Somebody can tell us what it all means.

14 THE COURT: Discovery motions is okay.

15 I notice you kicked your dispositive motions. I
16 guess that's, what, a couple months after the close of
17 discovery?

18 MR. BOUCEK: Yes, sir.

19 THE COURT: I can live with that.

20 MR. BOUCEK: Thank you.

21 THE COURT: Especially in a case that you think is
22 going to be legal, law sensitive.

23 Here's where I'm going to disappoint you. If you
24 don't file dispositive motions until July 22nd, then that
25 means the response isn't going to be filed until August 22nd,

1 and that means the reply won't be filed until September 15th
2 or so. I'd like to have some time to actually read it and
3 discuss it and consider it, so I can't handle -- your initial
4 pretrial and your pretrial memorandum and your trial date are
5 probably going to be moved back. You expect it to be a bench
6 trial because of the equitable relief. Your trial won't be as
7 early as 10/24. I'll have to move that back in order to give
8 me time to consider -- especially in a case where you think
9 dispositive motions are going to play a significant role. So
10 I'll move that back. But other than that, those other dates
11 you've given me are acceptable.

12 I've gone through the issues that I wanted to go
13 through but I want to give you all an opportunity. Is there
14 anything else anybody wants to say to me, something that you
15 think I'm off base on or something that you didn't get a
16 chance to say you want to say or anything like that?

17 MR. BOUCEK: No, Your Honor.

18 I want to compliment Mr. Ellis for being cooperative
19 in this.

20 MR. ELLIS: I say the same thing.

21 THE COURT: Well, good. We appreciate that. We
22 expect professionalism. I didn't give that speech because it
23 does look like you're working together but I have a
24 professionalism speech all ready for you.

25 I will say this. If you do get hung up on issues --

1 and I litigated for 30 years; sometimes you get hung up on
2 issues, especially representing public entities. I didn't
3 represent any school districts but I represented some public
4 entities occasionally. Don't let it set for a month while you
5 fight with each other, or two months. Give me a call; give my
6 office a call. We set up a telephone call and we'll try to
7 resolve the discovery dispute as soon as possible so that you
8 guys can go on about your work rather than getting all tied
9 up.

10 Now, this does not seem to be a case where we're
11 going to need a protective order other than if your clients
12 have some protective things they want to be protected from the
13 public. But the school district, most of that's public record
14 anyway, right?

15 MR. ELLIS: Most everything's public record, yes,
16 sir.

17 THE COURT: If for some reason they get into issues
18 that are not, try to agree on a protective order. I'm pretty
19 free to submit those and protect people's privacy. If you
20 can't agree on them, each submit your own version of it. If
21 you don't agree with it at all, just give me a telephone call
22 and we'll decide what's an appropriate one.

23 MR. BOUCEK: We appreciate that, Your Honor.
24 Mr. Ellis has been really reasonable. I think we can work it
25 all out.

1 THE COURT: Good. Anything else we need to talk
2 about?

3 MR. ELLIS: No, sir.

4 THE COURT: I'll get your scheduling order out
5 pretty quick here. I do need to check my schedule and see
6 what my trial schedule is. You think four days is enough?

7 MR. ELLIS: Yeah.

8 MR. BOUCEK: I think it's more than sufficient, Your
9 Honor, yes.

10 THE COURT: I do -- especially in judge-tried cases,
11 I keep it moving pretty quick. When we have juries, it
12 takes -- the breaks take a long time. When it's just me, we
13 try not to break too long. We keep going.

14 All right. Thank you all very much.

15 MR. BOUCEK: We appreciate the Court's time.

16 MR. ELLIS: Thank you, sir.

17 (Court stands in recess at 2:23 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Jeannine M. Rankin, Federal Official Court Reporter,
in and for the United States District Court for the Western
District of Missouri, Southern Division, do hereby certify
that the foregoing is a true and correct transcript of the
stenographically reported proceedings.

/s/ Jeannine M. Rankin

Date: 12/03/2021 Jeannine M. Rankin, CCR, CSR, RPR